NTSB Order No.
EM-111

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 10th day of July, 1984

JAMES S. GRACEY,Commandant, United States Coast Guard,

v.

RICHARD G. FIFER, II, Appellant.

Docket No. ME-103

OPINION AND ORDER

This appeal seeks review of a decision of the Commandant (Appeal No. 2338, dated January 6, 1984) affirming an order issued by Administrative Law Judge Michael E. Hanrahan on March 8, 1983.[1] By that order the law judge revoked appellant's merchant mariner's license (No. 174114) on his plea of guilty to the charge that he had been convicted of a narcotic drug law violation by a state court in Florida in March, 1982.[2] The Coast Guard has failed a reply brief opposing the appeal. For the reasons that follow, we will affirm the Commandant's decision.

The appellant contends, in support of his argument that revocation is a disproportionate sanction in this case, that the Commandant errand in affirming the law judge's conclusion that he was powerless to enter a sanction less than revocation even though he believed leniency was warranted in view of a variety of pre-and post-conviction circumstances. While we have consistently asserted our interpretation that the statute does permit consideration of sanctions other that revocation,see, e.g., Commandant v. Beroud, 2 NTSB 2742 (1975); Commandant v. Moore, 2 NTSB 2709 (1974); and, most recently, Commandant v. Graves, NTSB Order EM-104 (January 13,

[1]Copies of the decision of the Commandant and the law judge are attached.

[2]Under the statute in effect at the time of appellant's hearing, 46 U.S.C. §239b, the Commandant had discretionary authority to revoke the documents of a seaman who had, within the preceding 10 years, been convicted of a narcotic drug offense in certain courts of record.

1984), we have never reversed on that ground a revocation we believed, based on our own examination of the record, was appropriate in light of the underlying drug law offense. This case presents no occasion to do so, for it is not predicated on a drug conviction for which revocation could be reasonably deemed an excessive sanction. Moreover, we rejected in Graves, supra, a contention that the Coast Guard could not by regulating circumscribe the authority of its law judges to order any sanction save revocation in this category of cases so long as "the Coast Guard's procedures [otherwise] allow the opportunity for sanctions other than revocation to be considered" (see EM-104 at p. 4). We concluded in that cases that authority reserved to the Commandant in 46 CFR §5.30-10 "to reverse, alter, or to modify the decision of the administrative law judge" provided such an opportunity.

Appellant's drug conviction resulted from his attempt, along with another individual, to smuggle almost 2 1/2 tons (4900 lbs.) of marijuana into Florida on board a forty-five foot vessel. Appellant was sentenced, on his plea of guilty to possession of cannabis, to 364 days in the Broward County Stockade (of which he served four and a half months before being released), five years probation, and a fine of 10,000.[3]

We have previously recognized the appropriateness of revocation for drug law offenses arising in connection with drug trafficking, see, e.g., Commandant v. Hodgman, NTSB Order EM-103, at 5 (served January 3, 1984), and nothing in appellant's brief persuades us that that sanction is not warranted for his direct and substantial involvement in an attempt to bring a large quantity of illicit narcotics into the country. While such factors as appellant's clear prior record, the impact of his criminal conviction and incarceration on his personal and family life, and his asserted resolve to avoid similar conduct in the future may well counsel leniency in terms of the period of time appellant should be required to forfeit the maritime employment opportunities a license would enable him to pursue, they do not change the seriousness or the nature of his drug law offense. In fact, our

[3]In view of appellant's guilty pleas in both the state court criminal proceeding and the Coast Guard proceeding against his license, we see no need to determine whether the specification underlying the Coast Guard charge of misconduct cited the correct provision of Florida law his conviction there involved. We would observe, nevertheless, that the judgment of conviction recorded March 5, 1982 recites appellant's crime as "Possession of cannabis (over 100 pounds)", and cites Fla. Stat. 893-03(1)(c). See I.O. Exh. 2.

decision in Hodgman flatly rejected such factors as a basis for reviewing a revocation decision where, as here, that sanction is "consistent with the statute's goal to remove drug traffickers from the merchant marine" (id),[4] In such circumstances we will sustain the Commandant's revocation decision.

ACCORDINGLY, IT IS ORDERED THAT:

1. Appellant's appeal is denied, and

2. The decision of the Commandant affirming the revocation of appellant's seaman's license under the authority of 46 U.S.C. §239b is affirmed.

BURNETT, Chairman, GOLDMAN, Vice Chairman, BURSLEY and GROSE, Members of the Board, concurred in the above opinion and order.

[4]At the same time, our decision in Hodgman acknowledged that a factor such as an appellant's conduct following a drug conviction "may have a bearing on whether a new document, or proper application, should be issued" (id.). We would note, in this connection, that the Commandant has found appellant's evidence of rehabilitation sufficiently compelling to warrant a waiver of the three year waiting period for application for a new license under 46 CFR 5.13.

We agree with the appellant that the JACKSONVILLE's loss of propulsive power was not a hazardous condition within the meaning of the regulation while the vessel was at anchor in good weather or while the vessel was under tow.

The decisions of the law judge and the Vice Commandant do not explain the nature of the endangerment which an inoperative electric propulsion motor might pose. They appear to maintain, instead, that the vessel was in a hazardous condition because of the impact of a propulsive power loss on the vessel's maneuverability.[7] We find the Coast Guard's position untenable.[8] The fact that the JACKSONVILLE's propulsion motor was inoperative had, in our opinion, no impact on the degree of maneuverability the vessel possessed as it entered the port of Wilmington, for its maneuverability was essentially a function not of its own systems, but of the steering capabilities and propulsive power afforded by the tugs.[9] The clear weight of the evidence in this record is to the effect that the tugs were better able to maneuver the JACKSONVILLE in the river channel and the port of Wilmington than it could have maneuvered itself under its own power without their aid. Even if this were not true, any hazard involving the use of tugs that could not safely control the vessel during the towing and docking would be attributable to their capabilities, not to the

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[7]The only evidence in the record that the vessel was in a hazardous condition came from the Coast Guard Captain of the Port of Wilmington, a witness who was called by the appellant. His testimony reflected his personal opinion that <u>any</u> casualty related to maneuverability produced a hazardous condition. The only witness called by the Coast Guard, a marine inspection officer, testified that in his opinion the vessel was not in a hazardous condition as it made its way up the river into the port of Wilmington. Tr. at 121.

[8]The Coast Guard's position might have merit in circumstances where a vessel that had experienced a partial loss of propulsive power was operated, unassisted, under conditions that required the availability of full power for maneuvering purposes.

[9]The uncontroverted evidence that unmanned, unpowered barges as large as or larger than the JACKSONVILLE are routinely moved by tugs in and out of this port without prior notification to the Captain of the Port under §161.15 clearly supports appellant's argument that the Coast Guard's position that the JACKSONVILLE was in a hazardous condition is arbitrary and capricious.

vessel's lack of propulsive power.[10]

It may be that the movement of the flotilla consisting of tugs and vessel of the size of the JACKSONVILLE into the port of Wilmington particularly at night is a circumstance of which the Captain of the Port should be made aware beforehand so that the impact on other traffic in the waterway could be evaluated and supervision could be exercised or restrictions imposed where warranted.[11] But neither the possible desirability of providing or requiring such information nor the likelihood that overall safety along the waterway would thereby be enhanced justifies any conclusion that the JACKSONVILLE was in a hazardous condition when it entered the port of Wilmington.

ACCORDINGLY, IT IS ORDERED THAT:

1. Appellant's appeal is granted; and

2. The order suspending appellant's marine license is reversed.

BURNETT, Chairman, GOLDMAN, Vice Chairman, BURSLEY and GROSE, Members of the Board, concurred in the above opinion and order.

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[10]A master might be accountable in these circumstances if the capabilities of the tugs utilized were clearly inadequate.

[11]We note, in this connection, that as the JACKSONVILLE approached the mouth of the river its tug broadcast an advisory to traffic along the waterway that it had a vessel in tow.